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No. 88-1546

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

PACIFIC MUTUAL LIFE INSURANCE COMPANY, *et al.*,
Petitioners,
v.
HARRIETTE TURNBOW,
Respondent.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE MERCHANTS AND MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

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HARRIETTE TURNBOW,

Respondent.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The Merchants and Manufacturers Association (the "Association") respectfully requests leave to file the accompanying *amicus curiae* brief in support of Petitioner Pacific Mutual Life Insurance Company's ("Pacific Mutual") petition for a *writ of certiorari* to the Nevada Supreme Court. Counsel for Pacific Mutual has consented in writing to the Association filing an *amicus curiae* brief; counsel for Respondent Harriette Turnbow has refused consent.

The Association is a California non-profit corporation. Its purpose is to assist its member firms in the management of their human resources. More than 3,700 employers of varying sizes and from various industries are members of the Association. The members collectively employ over 1,000,000 employees in the State of California and also conduct business operations in other

states, including the State of Nevada. The Association respectfully submits that its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over a period of many decades, gives it a unique ability to focus on the short and long term impact and implications of the legal issues under consideration in this case.

The decision of the Nevada Supreme Court in this case adds to the list of those federal and state courts presently split over the critical issue of what constitutes an "employee welfare benefit plan" under the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 832, 29 U.S.C. §§ 1001-1461 (1982 & Supp. V 1987) ("ERISA"). This issue lies at the core of ERISA's regulation and its preemption of state law regarding employer-provided health, medical and other "welfare" benefits. Unless corrected by this Court, the decision of the Nevada Supreme Court will engender further confusion among the courts and employers and will create significant burdens for employers that Congress did not intend to impose. Inevitably, these factors will lead to a decline in the willingness and ability of employers to provide such benefits, a result directly contrary to the intent of Congress in enacting ERISA. In addition to the need to preserve ERISA's nationwide uniformity of regulation over employee benefit plans, the questions presented by the petition in this case are particularly important to the Association since the California state courts have themselves reached inconsistent views as to what constitutes an employee welfare benefit plan. Unlike the petitioner and the other *amici* who have thus far sought leave to file briefs, all of which represent the views of insurance companies, the Association's interest lies in explaining the views of its member employers on these issues of significant importance to their businesses and their employees.

For the foregoing reasons, the Association respectfully requests leave to file the accompanying *amicus curiae* brief.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* THE MERCHANTS AND MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

STATEMENT

The statement of this case is set forth in Pacific Mutual's petition, which statement is adopted here.

ARGUMENT

The Court should grant the petition for a *writ of certiorari* because the decision of the Supreme Court of Nevada creates an incorrect and unworkable standard for determining the existence of an employee welfare benefit plan subject to the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 832, 29 U.S.C. §§ 1001-1461 (1982 & Supp. V 1987) ("ERISA"). In so doing, it negates the uniform federal regulation of such plans which Congress intended and which this Court has repeatedly recognized through its decisions. Moreover, the decision deepens a split of au-

thority among federal and state courts which can only be resolved by this Court. The Court should also review the additional holding of the Nevada Supreme Court that a sole proprietor cannot be a "participant" in an ERISA plan since that conclusion, contrary to Congressional intent, would subject ERISA plans to simultaneous state and federal regulation.

I. THIS COURT SHOULD GRANT REVIEW REGARDING THE STANDARD FOR DETERMINING WHEN AN EMPLOYER HAS ESTABLISHED AN EMPLOYEE WELFARE BENEFIT PLAN.

A. The Decision Of The Nevada Supreme Court Is Inconsistent With ERISA's Language, Agency Interpretation, And Congressional Intent.

The principal question presented by the petition is one of importance to all private sector employers and their employees. As this Court has noted, in enacting ERISA and its sweeping preemption provision, Section 514(a), 29 U.S.C. § 1144(a) (1982), Congress made an express decision "to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations," *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987), and to "'eliminat[e] the threat of conflicting or inconsistent State and local regulation of employee benefit plans.'" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987) (quoting 120 Cong. Rec. 29933 (1974)). The decision of the Nevada Supreme Court reverses that Congressional intent and would leave the large majority of employee welfare benefit plans, including many of those sponsored by the Association's members for their employees, unregulated by ERISA and subject solely to state law.

As a matter of statutory interpretation, the Nevada Supreme Court's decision is plainly incorrect. Under Section 4(b) of ERISA, 29 U.S.C. § 1003(b) (1982), the coverage of the statute extends, with exceptions not relevant here, to "any employee benefit plan" which is de-

fined in Section 3(3), 29 U.S.C. § 1002(3) (1982), to include an "employee welfare benefit plan." ERISA Section 3(1), 29 U.S.C. § 1002(1) (1982), provides that the term "employee welfare benefit plan" shall include "any plan, fund or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical, or hospital care or benefits . . . ." There is no dispute that the major medical benefits at issue here are the type of benefits specified for coverage under an ERISA-covered employee welfare benefit plan. It is also undisputed that these benefits were provided as a result of an employer's subscription to a "trust created to pool small employers together to permit them to obtain lower insurance rates," Petition for *Writ of Certiorari* (Mar. 20, 1989) ("Cert. Pet.") at 2a, and that such benefits were provided for the sole proprietor, who owned the employer, and for three employees through the employer's payment of premiums over eight and one-half years. *Id.* Under a plain reading of the statutory language and its interpretation by most federal circuits, proof of these elements should be more than sufficient to establish that this benefit program is an ERISA-covered plan. The Nevada Supreme Court, however, inserted a new requirement into ERISA's statutory language, by holding that an ERISA plan exists only where "there is some indication that an employer is committed to or has guaranteed the continuation of such benefits" and that no ERISA plan exists "where, as here, there is no indication that the employer intended to guarantee the continued furnishing of the benefits." *Id.* at 4a. That requirement cannot be justified by the statutory language, and, for that reason alone, the decision is in error.

In addition to rewriting the statutory language, the decision also ignores the views consistently expressed by the Department of Labor, the federal agency primarily responsible for administration and enforcement of ERISA,

as to employee welfare benefit plans. In a regulation promulgated in 1975, early in the administration of ERISA, the Department of Labor excluded from coverage as an "employee welfare benefit plan" a "group or group-type insurance program offered by an insurer to employees" if the program met four criteria designed to determine whether the program was established or maintained by an employer.[1] 29 C.F.R. § 2510.3-1(j) (1988). Although the regulation expressly defines only arrangements which are excluded from ERISA coverage, the Department of Labor has consistently interpreted the term "employee welfare benefit plan" as including an arrangement under which an employer purchases welfare benefits for its employees either directly or through subscription to a trust, unless all of the criteria in the regulation for exclusion from ERISA coverage are present.[2]

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[1] Under the regulation, a program is excluded from ERISA coverage if: (1) the employer makes no contributions, (2) participation is completely voluntary for employees, (3) the employer does not endorse the program but permits the insurer to publicize the program and collects and remits to the insurers premiums paid by employees and (4) the employer receives no consideration except compensation for actual administrative services. 29 C.F.R. § 2510.3-1(j) (1)-(4) (1988).

[2] In *Taggart Corp. v. Life & Health Benefits Admin., Inc.*, 617 F.2d 1208 (5th Cir. 1980), the Secretary of Labor submitted an *amicus curiae* brief urging the court to declare that an employer's subscription to a multiple employer trust ("MET") "'established a single employer welfare plan.'" *Id.* at 1211 (quoting Brief for Secretary of Labor as *amicus curiae* at 15). Subsequently, in *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982), a case brought by the Secretary of Labor, the court accepted the position advanced by the Secretary that employers which had subscribed to a MET, had established "employee welfare benefit plans" subject to ERISA. *Id.* at 1375.

Similarly, the Department of Labor has consistently taken the position in interpretive letters that where unrelated employers subscribe to a MET to provide welfare benefit coverage for their employees, while the MET itself may not be an employee welfare benefit plan, each subscribing employer will have established its own separate employee welfare benefit plan under Title I of ERISA. *See,*

Only recently, in *Massachusetts v. Morash*, 57 U.S.L.W. 4429 (U.S. Apr. 18, 1989), this Court relied on a different section of this same regulation and on a subsequent Department of Labor interpretation, in holding that certain vacation pay practices did not constitute "employee welfare benefit plans." *Id.* at 4432 & n.14.

The Nevada trial court in this action properly applied this regulation and found that the benefits program at issue failed at least three of the regulation's four criteria for exclusion from ERISA coverage, because the employer had endorsed the benefits program, had automatically enrolled its employees for coverage, and had paid all of the applicable premiums. Cert. Pet. at 7a. Thus, the employer's benefit program was not excluded from coverage under the Department of Labor regulation and was an employee welfare benefit plan, as that term has been consistently interpreted by the Department. Neither the regulation nor any subsequent agency interpretation, however, was mentioned or addressed in the decision of the Nevada Supreme Court.

The Nevada Supreme Court's requirement that an ERISA-covered welfare plan must contain an employer commitment or guarantee of "the continued furnishing of the benefits" also imposes on employers a feature which Congress itself did not provide and manifestly did not intend. Cert. Pet. at 4a. Employee benefit plans covered by ERISA can be classified as either or both "employee pension benefit plan[s]" or "employee welfare benefit plan[s]," ERISA Section 3(3), 29 U.S.C. § 1002 (3) (1982). As to pension plans, ERISA does impose a

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e.g., United States Department of Labor, ERISA Opinion Letters 87-11A (Dec. 21, 1987), 87-02A (Jan. 8, 1987), 86-08A (Feb. 3, 1986), 82-59A (Nov. 11, 1982), 81-84A (Dec. 9, 1981), 81-73A (Sept. 24, 1981), 80-10A (Feb. 11, 1980) and 79-54A (Aug. 3, 1979). The administrative interpretation of ERISA by the Department of Labor which Congress entrusted with the statute's enforcement is entitled to great deference. *Massachusetts v. Morash*, 57 U.S.L.W. 4429, 4431 (U.S. Apr. 18, 1989).

variety of requirements designed to enforce an employer's commitment to provide promised benefits. Chief among these are Section 203(a) of ERISA, 29 U.S.C. § 1053(a) (1982 & Supp. V 1987), which requires each ERISA-covered pension plan to meet minimum standards for vesting of benefits, and Section 204(a), 29 U.S.C. § 1054(a) (1982 & Supp. V 1987), which requires that pension benefits be accrued in annual increments. Defined benefit pension plans are also required to provide for advance funding of benefits under part 3 of Title I of ERISA, 29 U.S.C. §§ 1081-86 (1982 & Supp. V 1987), and employer liability for, and certain federal guarantees of, such benefits are provided in Title IV of ERISA. 29 U.S.C. §§ 1301-1461 (1982 & Supp. V 1987). Even these requirements, however, have never been interpreted to require, least of all as a matter relevant to coverage under the statute, the type of open-ended employer commitment to continued provision of benefits envisioned by the Nevada Supreme Court.[3] Moreover, welfare plans, which

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[3] The Internal Revenue Service does require, as a condition of qualification as a plan entitled to favorable treatment under 26 U.S.C. § 401(a) (1982 & Supp. V 1987), that a pension plan be intended to be maintained permanently. Treas. Reg. 26 C.F.R. § 1.401-1(b)(2) (1988). Moreover, Section 89(k)(1)(E), 26 U.S.C. § 89(k)(1)(E) (Supp. V 1987) was added to the Internal Revenue Code for plan years beginning in 1989 to require, as a condition of tax qualification, that welfare benefit plans be established with the intention of being "maintained for an indefinite period of time." Obviously, Congress believed that this was a new requirement, the addition of which required amendment of the Code. Under a proposed Internal Revenue Service regulation, a plan will be treated as established with the intent that it will be maintained indefinitely if it is established and maintained for at least a consecutive twelve month period. Prop. Treas. Reg. § 1.89(k)-1, 54 Fed. Reg. 9460, 9496 (1989). More significantly, however, these requirements affect only such plans' entitlement to favorable tax treatment under the Internal Revenue Code and not their coverage as employee benefit plans under Title I of ERISA. *Cf. Donovan v. Shaw*, 668 F.2d 985, 990-91 (8th Cir. 1982) (Title I of ERISA applies to all covered employee benefit plans regardless of their tax-qualified status).

are much less extensively regulated by the statute, *see Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985), are expressly excluded from these requirements. *See* ERISA §§ 201(1), 301(a)(1), 4021(a)(1), 29 U.S.C. §§ 1051(1), 1081(a)(1), 1321(a)(1) (1982). The circuit courts have, thus, uniformly held that benefits under a welfare plan do not automatically vest and may be eliminated freely by the employer. *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988) (employer may reserve its right to amend or terminate medical benefit plans); *Young v. Standard Oil (Indiana)* 849 F.2d 1039, 1045 (7th Cir.) (an employer may unilaterally amend or eliminate a severance benefit plan which is an employee welfare benefit plan), *cert. denied*, 109 S. Ct. 529 (1988); *In re White Farm Equip. Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986) ("we discern no basis for finding mandatory vesting in ERISA for retiree welfare benefits"). The Nevada Supreme Court decision ignores these decisions and undoes the intent of Congress by imposing substantive requirements on employee welfare benefit plans under the guise of interpreting ERISA's coverage. For that reason also, the decision is in error and should be reversed by this Court.

B. The Nevada Supreme Court Decision Adds To A Conflict Among Federal And State Court Decisions.

The Nevada Supreme Court's decision rests on that court's adoption of a standard for ERISA coverage articulated by the Court of Appeals for the Fifth Circuit in *Taggart Corp. v. Life & Health Benefits Admin., Inc.*, 617 F.2d 1208 (5th Cir. 1980) ("*Taggart*"), *cert. denied*, 450 U.S. 1030 (1981). The decision also mentions, but mischaracterizes, the decision of the Court of Appeals for the Eleventh Circuit in *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) ("*Dillingham*") in which the *en banc* court disagreed with the broad rationale of *Taggart* and declined to adopt it as binding within the Eleventh Circuit. Both *Taggart* and *Dillingham* involved, as does this case, employers that provided welfare bene-

fits to employees through subscriptions to a multiple employer trust ("MET"). Holding that the employer had not created an ERISA plan through that subscription, the *Taggart* court stated, in a passage quoted with approval by the Nevada Supreme Court: "[W]e cannot believe that [ERISA] regulates bare purchases of health coverage where, as here, the purchasing employer neither directly nor indirectly owns, controls, administers, or assumes responsibility for the policy or its benefits." *Taggart*, 617 F.2d at 1211 (*quoted in* Cert. Pet. at 3a). In *Dillingham*, the Court agreed with the holding of *Taggart* on its particular facts, but stated that "[i]f *Taggart* implies that an employer or employee organization that only purchases a group health insurance policy or subscribes to a MET to provide health insurance to its employees or members cannot be said to have established or maintained an employee welfare benefit plan, we disagree." *Dillingham*, 688 F.2d at 1375. Thus, *Dillingham* created, in rationale if not result, a "split of authority" in the federal circuits. *Roe v. General American Life Ins. Co.*, 712 F.2d 450, 452 (10th Cir. 1983). As described in greater detail in Pacific Mutual's petition, subsequent federal decisions have generally adhered to the *Dillingham* line of analysis,[4] but certain state court decisions, including the decision in this case, continue to give vitality to *Taggart*. Cert. Pet. at 16-20.[5] Moreover, *Taggart* has never been overruled in the Fifth Circuit, and its rationale was recently cited by a district court in that

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[4] *See Kanne v. Connecticut Gen. Life Ins. Co.*, 859 F.2d 96, 98-99 (9th Cir. 1988); *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 738 (7th Cir. 1986), *cert. denied*, 482 U.S. 915 (1987); *Roe v. General American Life Ins. Co.*, 712 F.2d at 452; *see also Rizzi v. Blue Cross of Southern Cal.*, 206 Cal. App. 3d 380, 253 Cal. Rptr. 541 (1988).

[5] Of particular concern to the Association and its California membership is the decision in *Sayble v. Blue Cross of Southern Cal.*, 207 Cal. App. 3d 953, 255 Cal. Rptr. 144 (1989) (holding that an employer's purchase of group health insurance is insufficient to establish an ERISA plan).

circuit. *Pitre v. Louisiana Health Serv. & Indemnity Co.*, 122 F.R.D. 497, 499 (W.D. La. 1988). Thus, in addition to the conflict between the decision of the Nevada Supreme Court in this case and those circuit court decisions which have endorsed *Dillingham*, the continuing conflict presented by *Dillingham* and *Taggart* merits resolution by this Court.

C. The Decision Of The Nevada Supreme Court Presents A Nationwide Issue Of Great Importance To Employers.

The practical adverse consequences of the *Turnbow* decision on employers are several. Many of the Association's members are interstate employers with offices in other states, including a significant presence in Nevada. Due to the current conflict of case authority, employers which provide benefits to employees in different states, even in states within the same federal circuit, can only guess in many cases whether their health and medical benefit programs will be covered under federal or state law. Where Congress envisioned national uniformity of federal regulation and the complete displacement of state regulation, *see Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987) and *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 n.20 (1983), employers presently face only uncertainty and inconsistency of regulation. This alone will deter employers from establishing or maintaining employee benefit plans.

In those jurisdictions, including Nevada and California, where employers run the risk that their health and medical benefit programs will be judged under the *Turnbow* standard, they have several significant reasons to consider not providing those benefits or discontinuing those benefits that they already provide. The decision of the Nevada Supreme Court articulates a completely amorphous and unworkable standard for determining when an employer would be deemed to have sufficiently "guaranteed" or "committed to" a benefits program in order

for ERISA coverage to attach. Cert. Pet. at 4a. The Nevada Supreme Court held that an employer which enrolled its employees for benefits coverage, and maintained that coverage continuously for eight and one-half years by paying all of the applicable premiums, had not demonstrated a sufficient commitment to provision of those benefits for ERISA to apply. *Id.* Faced with such a standard, employers that are considering whether to provide such coverage for the first time will have no idea when, if ever, they will be considered to have established ERISA plans and whether, if business fortunes make continued provision of the benefits impossible, they will be judged in hindsight to have lacked sufficient commitment to provision of the benefits so that ERISA coverage will not exist. Thus, the test established by the Nevada Supreme Court would be certain to discourage employers from establishing benefit programs in the first instance. Moreover, if the *Turnbow* decision means that employers must formally "commit to" or "guarantee" that they will continue to furnish the benefits which have been initially provided, the financial disincentives to providing such benefits in the first instance will be enormous. Particularly given the recent trends in escalation of health care costs, employers would fear being locked into benefits programs which they ultimately could not afford. Inevitably, the result would be that employers would decline to provide such benefits or would provide them only at minimal levels below those considered otherwise acceptable by employees.

Although the Nevada Supreme Court dismissed the benefits program at issue as "the bare purchase[] of health insurance," *id.*, for most employers the purchase of insurance to provide such benefits is not merely one option, it is the only option, since only the largest employers could run the risk of providing such benefits from their own assets. It is, of course, possible for an employer to purchase insurance and still administer the claims for its

own employees. Most employers, however, are not equipped to perform, and do not want the burden and expense of performing, this function. Thus, it is extremely common for insurance carriers also to administer claims for the benefits they insure. *See e.g., Credit Managers Ass'n v. Kennesaw Life & Accident Ins.*, 809 F.2d 617, 626 (9th Cir. 1987); *Eversole v. Metropolitan Life Ins. Co.*, 500 F. Supp. 1162, 1165 (C.D. Cal. 1980); *see also* 29 C.F.R. § 2560-503-1(g)(2) (1988). If the *Turnbow* standard means that there is no ERISA coverage where an employer purchases insurance to provide benefits, or at least where the employer does not itself administer the benefits, then most employers which currently provide health and medical benefits would be subject to state law rather than ERISA.[6]

For these reasons, ERISA's purpose of expanding employee benefit coverage through uniform federal regulation would be subverted if the *Turnbow* decision is not reversed by this Court. Thus, the question presented here is of great importance for employers and employees throughout the nation, and review by this Court is both necessary and appropriate.

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[6] This would create the very "patchwork scheme of regulation" which, as this Court has noted, "might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 11. Moreover, because state law would provide damage remedies that are not provided by ERISA, the cost of the available insurance would inevitably increase, either causing insurers to leave the market or, more likely, making such insurance too expensive for small employers. In *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), this Court held that damage remedies were not available in suits for breach of fiduciary duty under ERISA. Although the Court reserved the question whether such damage remedies were available in suits regarding benefits under an ERISA plan, the circuit courts have uniformly ruled against the availability of such damage remedies. *See Sokol v. Bernstein*, 803 F.2d 532, 534 (9th Cir. 1986); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters.*, 793 F.2d 1456, 1462-65 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987); *Varhola v. Doe*, 820 F.2d 809, 817 (6th Cir. 1987).

II. THE COURT SHOULD ALSO GRANT REVIEW TO DETERMINE WHETHER A SOLE PROPRIETOR CAN BE COVERED UNDER AN ERISA PLAN.

The second question presented by the petition, while less developed in the case law, is also a question of nationwide importance to employers and the employee benefit plans they sponsor. As a separate ground for its decision, the Nevada Supreme Court held that, even if an ERISA plan did exist in this case, the plaintiff, who was the sole proprietor of the company which created that plan, was not an employee of that company and could not be a participant or beneficiary of the plan. Thus, reasoned the court, because the plaintiff had no ERISA-based remedies, her state law causes of action could not be preempted by ERISA. This holding is also in error and wildly inconsistent with ERISA's goal of uniform federal regulation. The practical significance of this holding is that an employer which is an unincorporated sole proprietorship or partnership may sponsor a single program of health benefits, one part of which is subject to ERISA, while the remainder is subject to state law.

As set forth in greater detail in Pacific Mutual's petition, Cert. Pet. at 21-26, this aspect of the Nevada Supreme Court's decision is also inconsistent both with applicable Department of Labor regulations and with the weight of authority among the circuit courts. More importantly, it creates the very overlap and conflict between federal and state regulation, within a single plan or program of benefits, which ERISA expressly sought to eliminate by preempting state law. ERISA's preemption provision must be construed to avoid "[t]he administrative impracticality of permitting mutually exclusive pockets of federal and state jurisdiction within a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 107-08. Otherwise, as

this Court warned in *Fort Halifax Packing Co. v. Coyne*, "[f]aced with the difficulty or impossibility of structuring administrative practices according to a set of uniform guidelines, an employer may decide to reduce benefits or simply not to pay them at all." 482 U.S. at 13 (footnote omitted).

CONCLUSION

For the foregoing reasons, the Association, as *amicus curiae*, urges this Court to grant the petition for a *writ of certiorari*.

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